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IN THE

Supreme Court of the United States

October Term 1975
NO. A756

PALISADES POWER SQUADRON ET AL.

Appellants,

v.

DIVISION ON CIVIL RIGHTS ET AL.

Appellees.

On Appeal From the Supreme Court of the State of New Jersey

JURISDICTIONAL STATEMENT.

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SUBJECT INDEX

	Page
Jurisdictional Statement	1
Opinions Below	2
Jurisdiction	2
Questions Presented	5
Questions Not Presented	5
Statute and Constritutional Provisions	5
Statement of the Case	6
How the Federal Questions Were Raised in the Proceedings Below	10
The Questions Are Substantial as a Matter of Constitutional Law	13
The Questions Are Substantial as a Matter of Public Importance	17
Conclusion	23

INDEX TO APPENDICES

		Page
A 1	Hearing Examiner's Report	1a
2	Division on Civil Rights' Final Order	19a
B 1	Appellate Division Opinion	25a
2	Appellate Division Denial of Rehearing	29a
C 1	New Jersey Supreme Court Denial of Petition for Certification	30a
C 2	New Jersey Supreme Court Dismissal of Appeal	31a
D 1	Notice of Appeal	32a
2	Order Extending Time to File Jurisdictional Statement	34a
E	New Jersey "Law Against Discrimination"	35a
F 1	First Amendment, United States Constitution	37a
2	Fourteenth Amendment, United States Constitution	37a

AUTHORITIES CITED

Cases	Page
Application of New York Athlectic Club 289 NY Supp 2d 246 (1968)	13, 18, 19, 21
Bantam Books Inc. v. Sullivan 372 US 58 (1963)	4
Bell v. Maryland 328 US 226 (1964)	14, 20
Cornelius v. Elks 382 FS 1182 (Conn. 1974)	8
Dahnke-Walker Milling Co. v. Bondurant 257 US 282, 288-9 (1921)	4
Delaney v. Central Valley Golf Club, 28 NY Supp 2d 932 (1941), affd. 31 NY Supp 2d 834, affd. 43 NE 2d 716	9, 25
Division v. Bystrickey, 36 AD2d 278, 320 NY Supp 2d 684 (1971), 30 NY 2d 322, 284 NE 2d 560	13
General Motors Corporation v. Blair, 129 N.J. Super. 412 (App. Div. 1974), 324 A 2d 52	13, 18
Gibson v. Florida Legislative Investigating Committee 372 US 39 (1963)	4, 11, 14
Golden v. Biscayne Bay Yacht Club, 370 F. Supp. 1038, _____F 2d _____, (CCA 5, 1975)	20
Griswold v. Connecticut, 381 US 479 (1965)	12, 14
Holmes and Mikals v. Elks, USDC Mid. Dist. Fla., Jacksonville Div. 7/18/75	16
Junior Chamber of Commerce v. U.S. Jaycees 495 F2d 883, cert. den. 43 USLW 3295 (1974)	20
Moose Lodge v. Irvis 407 US 163 (1972)	14, 20
NAACP v. Alabama 357 US 449 (1958)	4, 11, 14, 20
NAACP v. Button 371 US 415 (1963)	4, 15, 20
National Organization for Women v. Little League, 127 N.J. Super. (App. Div. (1974)	4,9,13,18
Philadelphia Electric Co. v. Pa. Human Relations Commission 5 Comm. Ct. 329, 290 A 2d 699 (Pa. 1972)	9

Cases	Page
Schwenk v. Boy Scouts of Cmerica, Civ. No. 410365 (Cir. Ct. Ore. June 1975)	9
Sullivan v. Little Hunting Park 396 US 229 (1969)	25
Tillman v. Wheaton-Haven Recreation Association 410 US 43 (1973)	25

CONSTITUTION AND STATUTES

	Page
United States Constitution First Amendment 5, 6, 11, 12, 13, 14, 15, 16, 17,	24
United States Constitution Thirteenth Amendment	13
United States Constitution Fourteenth Amendment 5, 6, 11, 12, 13, 14, 15,	24
U S Stat. 929, 28 USC 1257 (2)	4
New Jersey Statutes Annotated 10:5-1 et.seq. .. 2, 5,	8

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Appellants,

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DIVISION ON CIVIL RIGHTS ET AL.

Appellees.

JURISDICTIONAL STATEMENT

Palisades Power Squadron (and United States Power Squadrons) appeal from the final judgment of the Appellate Division, Superior Court of New Jersey, Docket No. A-3104 73, after order entered July 9, 1975, denying Appellants' Petition for Rehearing of judgment entered June 18, 1975, and Order of the Supreme Court of New Jersey dismissing Appellants' Appeal entered December 10, 1975. This Jurisdictional Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the Appeal and that the questions presented are constitutionally substantial and of public importance.

The Appellees are Marilyn C. Hinden, a woman appearing individually, and Vernon C. Potter, as Acting Director of the New Jersey Division on Civil Rights.

OPINIONS BELOW

The opinion of the hearing examiner of the Division on Civil Rights, before whom the matter was tried, is unreported. Copies of it and of the resulting orders of the Division are hereto attached as Appendix A. The opinion of the Appellate Division of the Superior Court filed June 18, 1975, is unreported, as is its order denying rehearing. Copies are hereto attached as Appendix B. The orders of the Supreme Court filed December 10, 1975, dismissing the appeal are unreported as yet. Copies are hereto attached as Exhibit C. Copies of the Notice of Appeal filed in the court on January 2, 1976, and of the order of this Court extending the time for filing this Jurisdictional Statement are hereto attached as Appendix D.

JURISDICTION

On complaint of Mrs. Hinden, the Division on Civil Rights brought this action to compel United States Power Squadrons to eliminate "male" from its eligibility requirements, which are binding on the component Squadrons including Palisades; to compel Mrs. Hinden's admission as a member of Palisades Power Squadron; and for onerous related relief. The suit was brought pursuant to New Jersey Statutes Annotated 10:5-l *et. seq.* (Law Against Discrimination), pertinent parts of which are hereto attached as Appendix E. That statute applies to "places of public accommodation" (only) and prohibits their operators from "discriminating" on the basis, *inter alia,* of "sex". It expressly excludes from coverage private clubs and institutions which are not open to the public.

Mrs. Hinden took and passed a free course in boating safety offered by Palisades Power Squadron to the general public. Thereafter she sought to become a member, although she well knew, before she took the course, that Palisades is a male boating club and has no female members. This complaint followed, on the asserted ground that Palisades is "a place of public accommodation". The defense was that it is not such a "place", and further that it is distinctly private; and that to subject it to bureaucratic surveillance deprived its members of their constitutional right of free association.

The Hearing Examiner "found" that Palisades is "a place of public accommodation", and upon that recommendation the Division issued an order so finding, awarding damages, prescribing advertising of the availability of membership to everybody, which order purportedly applies to all other Squadrons in New Jersey; and ordering United States Power Squadrons to delete "male" from its constitution. Note that there were no facilities, programs, services, etc., which were held to be "a place of public accommodation" but *membership*.

Surprised by the "findings", The Squadrons and Palisades asked that the hearing be reopened for rebuttal of the Hearing Examiner's unwarranted conclusions. This was denied. An attempt was then made to modify the procedures which the Hearing Examiner found objectionable, so as to insure the private nature of the organizations, but the Director refused to consider such a remedy and instead added to his order a provision that the objectionable membership procedures could not be changed for five years. (See amplification in Statement of the Case.)

The Squadrons and Palisades then appealed to the Superior Court of New Jersey, Appellate Division, which unanimously affirmed, on the sole authority of its own two-to-one decision in *National Organization for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974). Rehearing was denied. Three other Squadrons sought to intervene on the ground the order purported to apply to them, although they had not been complained against or heard, and their facts differed substantially from those "found" to be Palisades'. Their motion was denied. The Supreme Court of New Jersey refused to hear any of the appellants.

The Supreme Court of New Jersey's judgment became final upon entry of its order denying Appellants' timely filed appeal on December 10, 1975. Notice of appeal to this Court was filed in the Supreme Court of New Jersey on January 2, 1976.

The jurisdiction of this Court to hear this appeal is conferred by Stat. 929, 28 USC 1257 (2), the issue being a state statute, probably constitutionally innocuous on its face, being interpreted and applied so as to deprive Appellants of rights guaranteed by the federal Constitution. The following cases sustain such jurisdiction:

> *Dahnke-Walker Milling Co. v. Bondurant*, 257 US 282, 288-289 (1921); *Bantam Books Inc. v. Sullivan*, 372 US 58 (1963); *N.A.A.C.P. v. Alabama*, 357 US 449 (1958); *N.A.A.C.P. v. Button*, 371 US 415 (1963); *Gibson v. Florida Legislative Investigating Committee*, 372 US 539 (1963). *Bantam Books* is especially controlling. The Rhode Island statute against pornography was constitutional, but the high-handed methods of the administrative Commission in enforcing it against distributors of dirty books was not.

QUESTIONS PRESENTED

(1) In the light of the First and Fourteenth Amendments to the Constitution of the United States and without being repugnant thereto, may a state statute which requires "places of public accommodation" to *serve* all comers be interpreted and applied to dictate *choice of members* in a non-profit membership association?

Subsidiary to that question is: does an interpretation of the statutory term "places of public accommodation" so broad as to include membership in non-profit membership associations so blur the line between covered commercial enterprises and constitutionally excluded associations as to make the statute (so interpreted) unconstitutionally vague?

(2) Under the same constitutional considerations, may such a statute be interpreted and applied to prevent such an association from divesting itself of any "place of public accommodation" aspects and thereafter being free from surveillance under the statute?

It is of utmost importance that *no* question is presented as to whether women may be admitted to full membership in Palisades or the Squadrons. *The sole issue is whether their internal affairs will be run by their members or by a governmental agency.* As to "discrimination" see the Public Importance section *infra*.

STATUTE AND CONSTITUTIONAL PROVISIONS

The statute here involved is the New Jersey "Law Against Discrimination", N.J.S.A. 10:5-l, *et seq.*, pertinent portions of which are set forth in Appendix E hereto.

Pertinent portions of the First and Fourteenth Amendments to the Constitution of the United States are set forth in Appendix F hereto.

STATEMENT OF THE CASE

United States Power Squadrons is a national boating fraternity operating on the lodge system. It was founded in 1914 by a group within the Boston Yacht Club, and spread to other clubs. Later, squadrons (chapters or lodges) were established independent of other clubs. There are now about 80,000 members in about 400 Squadrons. Within minimal guidelines prescribed by the national organization, including the required limitation to male members, and the strong recommendation of screening and other techniques to assure compatability, each Squadron is free to conduct its own affairs under its own policies, including policies as to membership, which vary widely from Squadron to Squadron. All members are elected by local Squadrons; the national organization has no members except those so elected.

Palisades Power Squadron and United States Power Squadrons are both New Jersey non-profit membership corporations. United States Power Squadrons is involved in this litigation solely because of its constitutional limitation to male membership; but through it the Division is trying to reach Squadrons other than Palisades, which is the only one complained against, served or summoned in these proceedings. Palisades and the Squadrons are supported entirely by members' dues and assessments; they receive no contributions from the public nor from any governmental agency.

The associational interest of the Squadrons is pleasure boating (both power and sail) with emphasis on both the social aspects and self-education for enhancement of boating pleasure.

In addition to the internal instruction program, the Squadrons conduct a public charity or civic service offering an elementary course in Boating that is open to everyone without any restriction and free of charge except for materials. Until recently, passing that course, although not required by USPS, was as a practical matter a technical prerequisite to joining Palisades.

The nominal complainant, Marilyn C. Hinden, and her husband took the widely advertised public Boating course* offered by Palisades in 1969 and passed the related examination. Mr. Hinden was subsequently invited to become a member, and did; and Mrs. Hinden was offered, and accepted, a Woman's Certificate. The Certificate entitled her to take all the membership courses, open only to members and Certificate holders, to be an instructor, and otherwise to participate in Squadron activities, social and other; but not to wear the yachting uniform, vote or hold office. Actually, Squadron membership is indistinguishable from family membership in most private clubs; the husband is the "member", but wives and children participate in the benefits. In addition, in the Squadrons, a wife or daughter who becomes technically qualified is given the Certificate which authorizes her to take advanced courses and to teach, etc., as noted above.

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* *Only* the public course was advertised; *never* membership nor internal activities.

Mrs. Hinden took one short advanced course (out of three long and seven short available), was offered an opportunity to teach and declined it. When the District* of which Palisades is a part staged an educational conference for members engaged in teaching, she demanded to go (although not a teacher) under threat of disrupting the conference by physical violence; and when told she might go failed to appear.

United States Power Squadrons had an office in Montvale, New Jersey, which housed a few employes handling clerical matters, supplies, etc., and was not open to the public nor generally even to members. It had no other physical facilities, and no liquor, food or other license. Palisades Power Squadron had no physical facilities, no employes and no licenses. All its activities, including teaching, were conducted by members and Certificate holders voluntarily and uncompensated. Public schools were used by permission for the public charity. Other public facilities, such as marinas, were rented for various affairs on a non-exclusive basis, no differently than by other yacht clubs or individuals.

The statute purports to apply only to "places of public accommodation". Under the facts it is extremely diffficult to see how it could be held to cover USPS or Palisades, but the Hearing Examiner opined that it did and the Appellate Division agreed. That court's decision (review having been denied by the State Supreme Court) is binding here, both as to facts and as to the meaning of the New Jersey statute, even though that interpretation is at variance with decisions of other courts interpreting identical language. *Cornelius v.*

*** Squadrons near to each other are loosely organized into "Districts" to facilitate communication, to exchange ideas, to combine social activities, etc.**

Elks, 382 F. Supp. 1182 (Conn. 1974); *Philadelphia Electric Co. v. Pa. Human Relations Commission*, 5 Comm. Ct. 329, 290 A 2d 699 (Pa. 1972); *Schwenk v. Boy Scouts of America*, Civ. No. 410365 (Cir. Ct. Ore June 1975); and similar language: *Delaney v. Central Valley Golf Club*, 28 N.Y.S. 2d 932 (1941), Affd. 31 N.Y.S. 2d 834, Affd. 43 N.E. 2d 716. (That last points out also that statutes of this type, being in derogation of common law rights and semi-criminal by nature, should be strictly construed against coverage.)

The authority relied on was *National Organization for Women v. Little League Baseball, supra,* in which the majority of the Appellate Division held that little boys, ages 8 to 12, may not play baseball without inviting little girls to play with them, because "place" was "a word of convenience and not of limitation", and anyway the parks where the games were played were "places", the program was public because all boys were invited, the program was an "accommodation", and there isn't any difference between boys and girls, at least not at those ages. While we deplore that decision, we tried unsuccessfully to point out to the Court the great difference between that case and ours: in *Little League* the suit was to have girls admitted to the public charity, not to join in management of the association. In this case, the nominal complainant, along with all others, was freely included in the public charity (and other benefits as well) and she seeks to participate in management (through direct membership).

The rationale in the Hearing Examiner's opinion is very cloudy, but a fair summary is: the Boating course is open to everybody and is admittedly "public"; Palisades drew all its members from the course*; nearly all male graduates

*** See footnote page 22** *infra.*

interested in membership were invited to become members; therefore *membership* was a "place of public accommodation". This was reinforced by a wholly unwarranted and irrelevant observation that the Squadrons had about them a "government or official aura".

As soon as the surprising report of the Hearing Examiner was received Appellants undertook to remove the features on which the "place of public accommodation" conclusion was grounded. The public course was removed as a prerequisite to membership; additional and more careful screening procedures were instituted; honorary memberships for government officials were discontinued, etc. Appellants then sought to reopen the proceedings (1) to put in evidence of those changes and (2) to dispose of the irrelevant "government aura" by showing that many private clubs extend honorary membership to selected government officials, that everyone is invited to participate in the National Ocean Survey's cooperative programs, etc. (3) to rebut other assumptions indulged in by the Hearing Examiner. Far from recognizing these good faith attempts to comply with the law, the Director characterized them as "procedural manipulations" to "evade". He not only refused to permit any reopening, but added a paragraph to his order prohibiting for five years any efforts to improve membership procedures, and, going beyond that, prohibiting any "subjective" considerations—i.e., proscribing any selectivity whatsoever.

HOW THE FEDERAL QUESTIONS WERE RAISED IN PROCEDINGS BELOW

The constitutional questions, as well as the statutory questions, were presented at every opportunity, and were

vigorously argued in brief and orally. The constitutional right of freedom of association was drawn to the attention of the Hearing Examiner, but she determined it had no application except to "private clubs", and Palisades, she said, was not such a club. No briefs were filed in the administrative proceeding. Both First and Fourteenth Amendment considerations were pressed upon the Appellate Division in the initial hearing. They were urged in the motion for rehearing and in the attempted appeal to the Supreme Court. It was contended that the appellants' right of association, guaranteed by the First Amendment, was infringed, first by ordering admission to membership of persons not chosen by appellants, whether or not they were "private clubs", and second by refusing to permit the offending features to be eliminated so that private club status would prevail in the future; and that for the same reasons the Fourteenth Amendment was violated. The intervenors, other New Jersey Squadrons who were not parties to the proceedings, protested in both courts the failure of due process, guaranteed by the Fourteenth Amendment, in attempting to apply the order to them without according them a hearing.

The Appellate Division's opinion does not indicate that it gave any serious consideration to the constitutional questions which were clearly and strongly presented to it. For example, it was said in the first brief:

> It is well settled that the freedom to associate is constitutionally protected and may not be circumscribed by a state agency.

This was supported by quotations from Justice Harlan in *NAACP v. Alabama*, 357 U.S. 449 (1958), Justice Black in *Gibson v. Florida Legislative Investigating Committee*, 372

U.S. 539 (1963), and Justice Douglas in *Griswold v. Conn.*, 381 U.S. 479 (1965), none of which involved a private club.

And in the petition for rehearing:

> The Court notes . . . Defendants' argument that the Division's application of the statutory term "place of public accommodation" to membership organizations such as themselves constitutes an unlawful denial of the right of free association secured by the First and Fourteenth Amendments . . . The Court . . . has apparently rejected Defendants' First Amendment argument, but has failed to advance any reasons . . .

Questions presented to the Supreme Court of New Jersey in the unsuccessful attempt to induce that court to review the case included:

> 2. Whether application of the public accommodation provisions . . . to voluntary, non-profit organizations of persons . . . constitutes a deprivation of the right of free association secured by the First and Fourteenth Amendments . . .
>
> 4. Whether the attempt . . . to prevent . . . USPS and Palisades from becoming in the future (if they were not already) private clubs constitutes an unconstitutional restraint on their rights of free association and a denial of due process of law?

In different words, these are the same questions now presented to this Court.

Even though *sub silentio*, the constitutional questions were necessarily decided in order to sustain the judgment over the objections raised so plainly. This Court therefore has jurisdiction.

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF CONSTITUTIONAL LAW.

Background

"Human rights" or "civil rights" statutes have proliferated, and while most of them, at least, are constitutional in their words (being extensions of the ancient English innkeepers' law and authorized implementation of the Thirteenth and Fourteenth Amendments) their applications by commissions and some courts borders on the unbelievable. This is such a case. No consideration whatever is given to the right of privacy – the right to be let alone.

Worst of all are the bureaus – the commissions that are created to administer the "human rights" statutes. Instead of impartial administration they actively crusade to extend their jurisdiction to force "integration" in complete disregard of First Amendment rights and of statutory limitations intended to protect those rights. *NOW v. Little League, supra; General Motors Corp. v. Blair,* 129 N.J. Super. 412 (App. Div. 1974), 324 A 2d 52; *Division v. Bystrickey,* 36AD 2d 278, 320 NYS 2d 604, 30 NY 2d 322, 284 NE 2d 560; *Application of New York Athletic Club,* 289 N.Y. Supp. 2d 246 (1968).

Thirteenth and some Fourteenth Amendment considerations are being heavily emphasized (and distorted) while First (and other Fourteenth) Amendment considerations are neglected. In some cases courts have perceived a conflict between the First and Fourteenth Amendments, although, properly interpreted, the Fourteenth doesn't conflict at all with the First.

In this case there is no conflict – if indeed there is in any case – between the Thirteenth and Fourteenth Amendments on one hand and the First (and Fourteenth) on the other. What is needed from this Court is a ringing declaration of the First Amendment protection of freedom of association – such as has been done for freedom of the press even when other rights were being transgressed. There have been such statements, but some lower courts, as in this case, persist in defying them. Thus, Justice Goldberg, concurring in *Bell v. Maryland*, 328 U.S. 226 (1964):

> The constitutional protection extended to privacy and private associations assures against the imposition of social equality . . . the Congress that enacted the Fourteenth Amendment was particularly conscious that the "civil" rights of man should be distinguished from his "social" rights . . . it is the constitutional right of every person to close his home or club to any person or to choose his personal intimates and business partners solely on the basis of personal prejudices including race.

And Justice Douglas for himself and Justice Marshall, dissenting on other grounds in *Moose Lodge v. Irvis*, 407 U.S. 163 (1972), specifically made the point with respect to a private club. To the same effect, Justice Harlan for the Court in *NAACP v. Alabama, supra;* Justice Black concurring in *Gibson v. Florida Investigating Committee, supra;* and Justice Douglas for the Court in *Griswold v. Connecticut, supra.*

First Question

Statutes of this kind, being in derogation of common law rights, should be strictly construed. The very broad construction given by the New Jersey courts in this case clearly violates the mandates of this Court. For example, it was said in *NAACP v. Button, supra,* p. 433:

> Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

and at page 432:

> [the courts] will not presume that the statute curtails constitutionally protected activity as little as possible. For standards of permissable statutory vagueness are strict in the area of free expression.

The potential for harrassment in these matters is tremendous, and the full potential is applied by the commissions as illustrated in the cases cited *supra* (out of many). This case is a good example. A complainant with a fancied grievance is able to enlist the attorney general and the Division, including the Hearing Examiner, to prosecute her case entirely at taxpayer expense. Defendants must pay out of their own pockets the enormous expenses of defense. The many thousands of dollars so far consumed are a very punishing burden; and, not withstanding that counsel's services in this appeal are contributed free of charge, there are very substantial additional costs. Already this case has induced three similar ones in New York, with another severe strain on the resources of this voluntary non-profit membership association. While USPS can survive the *present* attacks (though it is far from certain that Pali-

sades and the other individual Squadrons can), a proliferation of such suits could and probably would cripple the organization.

Second Question

The second attack which the New Jersey decision in this case makes upon the First and Fourteenth Amendments freedom is even more startling. It says that since we have found your past behavior to have made you a "place of public accommodation" and hence within our grasp, not only must you pay for your sins but you must *forever remain* a "place of public accommodation" subject to our surveillance - - and no amount of reform on your part will enable you to escape. *This raises an important constitutional question never considered by this Court.*

The only other case we know of in which the precise question was decided is the very recent one of *Holmes and Mikals v. Elks Club,* USDC Mid Dist Fla Jacksonville Division July 18, 1975. The club operated a dining room and carelessly allowed some others than members and bona fide guests to eat there. One whom it did not invite sued. The court found the club had so run its dining room as to make it a "place of public accommodation" and that the club must *either* open it to all comers or restrict it to members and guests accompanying them. The club understandably opted for the latter and the case was concluded on that basis. We submit the decision is eminently sound; but the issue should be settled by *this* Court. But even in the first instance, it was the *dining room,* not the *membership* that was a "place of public accommodation".

Once again, distinction should be made between the commercial enterprises which take on some of the trappings of privacy to evade the law, while continuing in substance their commercial nature; and situations such as the present. We submit that even a commercial enterprise *could* make a genuine conversion and thus fall without the jurisdiction of such statutes. Here, however, there is no conversion at all. It is perfectly clear that the Squadrons were organized as private clubs and for 60 years have considered themselves such. They sell nothing, have no facilities open to the public, are controlled entirely by their members (as against by a proprietor), have a common associational interest, select their members by their own criteria, and are supported entirely by their own dues and contributions. Even if it be assumed, as the Hearing Examiner concluded (contrary to the words of this Court quoted *supra*), that carelessness in Palisades' member screening procedures turned it into a "place of public accommodation" it surely has a constitutional right to amend those procedures and restore its private status. Prior restraint on freedom of association cannot be constitutional.

THE QUESTIONS ARE SUBSTANTIAL AS A MATTER OF PUBLIC IMPORTANCE

"The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."

-- Alexis de Tocqueville: *Democracy in America,* 1835.

Statutes in this area recognize that private clubs and similar organizations are entitled to keep their First Amend-

ment right of freedom of association – freedom to select their associates on any basis or no basis and not be questioned about it. The New York statute, for instance, so provides. But the New York City Commission on Human Rights (which has concurrent jurisdiction to administer the statute) is vehemently opposed to that statutory policy. Similar administrative agencies, and even some courts, such as those in this case, have the same views but express them more subtly, such as finding some excuse to deny private status or, admitting it, finding some trivial "state action". The New York City Commission, however, forthrightly declares its war on all selectivity. It even deplores the fact that the Harvard Club of New York City decided to accept women by voluntary vote of its members – it should have been forced by the Commission! "Behind Closed Doors – Discrimination by Private Clubs" – N.Y.C. Comm. on Human Rights, 52 Duane Street New York NY 10007, May 1975. It is devoting much energy to attempting to circumvent the statute it is commissioned to apply, while urging further legislation. *Application of New York Athletic Club, supra.*

Such bureaucratic excesses are by no means confined to New York. The New Jersey bureau is no better. *General Motors v. Blair, supra.* And courts too often support such endeavors. *NOW v. Little League, supra.*

The constitutional and statutory concept of "discrimination" relates to political franchise, schools, employment, housing, business–to "civil" rights, not "social" rights. If I marry Ruth, that is no"discrimination" against Helen or Susan, and that is so even though Ruth and I be ethnically European while Helen is Levantine and Susan is African.

And if then Ruth and I invite the Smiths, Joneses and Browns to our home for an evening of viewing each others travel pictures, that is no "discrimination" against the Millers or the Greens, and that is so even though their pictures may be better than any of ours, and even though we are all Europeans, the Millers are Levantines and the Greens are Africans.

So also: if eight ladies gather every Tuesday for an afternoon of bridge, gossip and thin watercress sandwiches, that is no "discrimination" against their husbands. And if those same husbands get together every Friday for an evening of poker, beer and corned-beef-on-rye, that is no "discrimination" against their wives.

The principle does not disappear nor diminish in importance with increasing size of the group. So if the picture-viewers, the bridge players and the poker players decide to erect a clubhouse for greater convenience and add a swimming pool, they still are not "discriminating" against anybody; and they *still* are not if they invite some of their friends to join them; or friends of their friends.

Even cases upholding the right of privacy of private clubs are confused on this point. Their rationale is that since the club is private it has a right to "discriminate"– e.g. *Application of New York Athletic Club, supra.* Whether there isn't any "discrimination", or clubs have a right to "discriminate", is not mere semantics. There is a very important psychological difference. A "right to discriminate" is reluctantly conceded and hence tends to be unduly circumscribed; but if it is recognized that no "discrimination" is involved the attitude is quite otherwise.

In what seems to us a prime example of a bad decision resulting from failure to recognize this point a three-judge court,* with a strong dissent, held a private club "discriminatory" because "the sponsorship requirement had the effect of perpetuating a membership consisting of persons of similar background, race and religious preferences." That, of course, is precisely how a private club operates and is constitutionally permitted and expected to operate—and it is no more "discriminatory" than the illustrations above, going all the way back to the marriage. The club had so argued.

Note how strongly this conflicts with Justice Goldberg's concurring opinion in *Bell v. Maryland*, quoted *supra* at p. 14 [illegible] and with Justice Douglas's declaration in *Moose Lodge v. Irvis*, referred to on the same page. If generally followed it would, as it is probably intended, destroy all private clubs, notwithstanding that Congress, and the state legislatures (including New Jersey), have expressly declared that private voluntary organizations are off limits for such claims of "discrimination".

Before further chaos ensues there should be a firm decision from this Court affirming Justice Goldberg's and Justice Douglas's views, which they phrased more skilfully than anything we can compose, adding the point that selection of associates is not "discrimination".

Freedom of association is not the exclusive domain of private clubs, with or without physical facilities. *Junior Chamber of Commerce v. U.S. Jaycees,* 495 F2d 883, cert. den. 43 USLW 3295 (1974); *NAACP v. Alabama, supra; NAACP*

* The case is still sub judice and is mentioned only for that remarkable quotation. *Golden v. Biscayne Bay Yacht Club,* 370 F. Supp. 1038, _____ F2 _____ (CCA5, 1975). Reversed *en banc* 4/ /76.

v. Button, supra. But the administrative agencies and some courts think the NAACP decisions are irrelevant to other situations, deeming negroes are entitled to protections unavailable to others. This Court should put that notion to rest.

There are many national fraternities and sororities that conduct public charities: Moose, Elks, Lions, Shrine, Kappa Kappa Gamma, Daughters of American Revolution, for example. They differ from the Power Squadrons only in that they do not draw their members from their public charities, as Palisades did* but does no more. What is needed is a declaration by this Court that conduct of a public charity does not cause a private association to lose its privacy.

Application of New York Athletic Club, supra, illustrates the point. NYAC is a private club which used to conduct a public charity: a track meet open to everyone without restriction. A rowdy group "demonstrated" at the meet because NYAC's membership is selective. The New York City Commission, declaring that there was "international outrage" because NYAC did not invite its African beneficiaries to become members, sought to force the issue. The court struck down that effort, the substance of the holding being that a private club can conduct a public charity without losing its privacy nor opening up its membership to its beneficiaries; use of the public facility for the public charity was irrelevant.

* Actually, this is misleading. One of the elements of proof that would have been put in if reopening had been allowed is that many members were informally invited by friends *before* taking the course and then told to take the course in order to become technically qualified.

And we suggest that even some of the most distinguished may recruit from among their beneficiaries. We have in mind The Society of Jesus.

(We are told that in an effort to forestall further attacks by the Commission, NYAC has discontinued the public charity, to the benefit of no one).

Individual Squadrons are threatened elsewhere, and will be seriously handicapped if this New Jersey decision stands. There are now three cases pending by and before the New York State Division of Human Rights, with allegations similar to those in the instant case: in each case a member's wife who passed the public Boating course asserts a "right" to become a full member too. The facts in those cases, are, of course, different from the facts here, because each Squadron has its own policies and procedures; but a decision that Palisades, and especially USPS, are not entitled to select their own members would be highly damaging. So also denial of the right to *become* private.

All private clubs, and especially those which conduct public charities or perform civic services, are endangered by the type of thinking exemplified in the instant decision and rampant in the commissions to which administration of "human rights" laws has been entrusted, and which, unfortunately, actively espouse policies of their own rather than implementing those enjoined upon them by constitution and statute.

The impact of the New Jersey decision, if allowed to stand, will be tremendous. While it will not prevent each of the 400-plus Power Squadrons from appealing its own case, it will make it necessary for each one attacked to do so, with the attackers getting a free ride at taxpayer expense while the Squadron must raise out of its own voluntary pocket the enormous expense of defense; and it will make

that defense more difficult, because the administrative agencies, and, unfortunately, some courts, will hide behind Palisades to "promote equality" and "eliminate the last vestiges of discrimination".

And the same goes, to a degree not much less, for the thousands of other national fraternities and private clubs. Once it is established that an organization is subject to jurisdiction of one of these commissions, its freedom is wholly gone. Every action (or non-action) unfavorable to any member of any protected group (currently especially Africans and women, but also Levantines, "Spanish speaking", etc.), is strongly presumed to be because of such membership, with a burden of proof so heavily imposed as to make the presumption all but conclusive.

It is self-evident that private, voluntary, self-supporting, non-profit membership associations cannot survive in such an atmosphere. The present is an ideal case for this Court to halt the current trend to such excesses and reaffirm the constitutional right of association and privacy.

CONCLUSION

The New Jersey Appellate Division's decision affirmed a dubious finding of "fact" by the Hearing Examiner that Palisades invited to membership all, or nearly all, men who passed its widely advertised public Boating course and still more dubious conclusion that *membership* in not only Palisades, but in USPS as well and, purportedly, *all other Squadrons in New Jersey*, were "places of public accommodation", not entitled to select their members, nor permitted to amend their errant practices, if any, to remain, or become, private clubs; and the Supreme Court of New Jersey refused

to grant a hearing.

These decisions are binding as to the interpretation of the New Jersey statute; but they are not binding on this Court as to constitutional requirements. The New Jersey decision makes *membership* in Palisades and the Squadrons "places of public accommodation" for purposes of the New Jersey statute, but the legal conclusion of "place of public accommodation" under a local statute is not conclusive in application of the First and Fourteenth Amendments.

The New Jersey statute as applied is repugnant to the First and Fourteenth Amendments in two important respects: it denies appellants their associational right to select their own members; and it denies their due process right to eliminate whatever, if anything, was offensive in their procedures and thereafter be purely private.

Two issues are presented: one old one in a new setting (First Amendment protection for private, non-profit associations); and a novel one (whether an association which has engaged in activities causing it to be called "public" can be prevented from dropping those activities and thus becoming private). These questions are of vital importance to Appellants, to other of the 400 Squadrons, and to numerous other private associations, including especially all those organized on the fraternal lodge system who conduct public charities.

It must be emphasized that whether or not women will be invited to full Squadron membership is no part of the issue in this case. Since a motion to consider such was withdrawn in 1971 solely because of this litigation, it

is virtually certain that but for this litigation the question of full female membership by voluntary constitutional amendment would have been considered. Were it to be turned down, doubtless it would have been for lack of interest: why would a woman pay $20 a year dues for very little, if anything, more than she now gets for a one-time lifetime fee of $7? The issue is not that at all; it is, very simply, whether the internal affairs of the Squadrons will be controlled by their members or by governmental commissions.

This Court held in *Sullivan v. Little Hunting Park*, 396 US 229 (1969), and again in *Tillman v. Wheaton-Haven Recreation Association*, 410 US 431 (1973), that the organizations there involved (operators of physical facilities, unlike Palisades) were "places of public accommodation" because "There was no plan or purpose of exclusiveness." This is in sharp contrast to the Squadrons, and "occasional relaxations" do not defeat the rule. *Delaney v. Central Valley Golf Club, supra.*

Respectfully submitted,

DONALD K. BARNES
Attorney for Appellants

26 Palm Club
Pompano Beach
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April 23, 1976

APPENDIX A

Hearing Examiner's Recommended Findings of Fact and Conclusions of Law
(Dated June 1, 1973)

Sylvia B. Pressler, Esq., designated from the panel of Hearing Examiners by the Director of the Division on Civil Rights, in the Department of Law and Public Safety, to conduct a hearing in the above-entitled matter and to recommend findings of fact and conclusions of law, pursuant to N.J.S.A. 10:5-8(1) respectfully submits herewith her report thereof, following a hearing held in this cause on April 27, 1971, April 28, 1971, April 29, 1971 and May 11, 1971.

This is a complaint brought by Marilyn C. Hinden, a female, charging respondents with an act of proscribed sexual discrimination in violation of the public accommodation provision of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(f). The respondents are the United States Power Squadrons, a national organization; Palisades Power Squadron, a local power squadron organization, chartered by the national organization and operating in Bergen County, New Jersey; and District IV of the United States Power Squadrons, a confederation of chartered local power squadrons in New York City and northern and central New Jersey, of which Palisades Power Squadron is a member. The complaints against the individual respondents, all of whom had been joined because of their status as officers of the various organization respondents, were dismissed during the course of the hearing on their motion which was consented to by the Deputy Attorney General.

The gravamen of the complaint is, of course, that the power squadron organization, on its national, district and local levels, constitutes a public accommodation within the intendment and coverage of the New Jersey Law Against

Hearing Examiner's Recommended
Findings of Fact and Conclusions of Law

Discrimination, and hence, the complainant may not be denied either membership therein, or the use and enjoyment of the facilities, accommodations and advantages thereof on the ground of her sex alone. The respondents urge that the power squadron organization, on each of its levels, is a bona fide private club exempt from the coverage of the Act.

There is no question but that women are systematically and expressly excluded from membership in the power squadrons, and this, by virtue of a provision in the national's constitution limiting membership to male citizens. Nor is there any question that complainant desired, but was denied, membership in the Palisades Power Squadron. Thus, the only question requiring determination is whether or not the United States Power Squadrons, and more particularly, the national organization, District IV and the local squadron here joined, are indeed covered by the Act. That determination, in turn, depends upon the complex of facts regarding the structure, nature and operation of the power squadron organizations. These facts, to a large extent undisputed, were adduced primarily through the testimony of officers of the various respondents and other local respondents and through such documentary evidence as the constitution of the national organization, the by-laws of the national, district and local organizations, the membership manual, other bulletins and documents published or circulated by the squadrons and magazine articles appearing both in the United States Power Squadrons' house organ and boating publications generally.

By way of background, the United States Power Squadrons is the national parent organization, with national headquarters located in Montvale, New Jersey. It is a non-profit organization dedicated to boating education and safety in the United States. The structure of the organi-

Hearing Examiner's Recommended
Findings of Fact and Conclusions of Law

zation is based upon the local power squadrons, of which there are some 400 throughout the United States, having a combined membership at the time of these hearings of approximately 80,000 men. The local chapters are grouped into regional districts, covering specific geographical areas. At the time of these hearings, there were 30 such districts. Neither the national nor the districts have their own members. The members of the organization are members of a local squadron, and it is by virtue of local squadron membership that they are members of the national and district organizations.

The national constitution expressly governs the operation of the districts and local squadrons, which may, however, have their own by-laws provided they are in accord with the national constitution and by-laws. There is no question but that Palisades Power Squadron is a member of District IV, that Palisades Power Squadron, itself, takes its membership from Bergen County, and that it is in every way a fully chartered and approved local of the United States Power Squadrons.

There are two basic areas of the United States Power Squadrons' operation which require consideration. The first of these is the nature of its operations, i.e. the work it actually does and the extent of its public involvements. The second, of course, is the nature of its membership practices and policies.

The purpose and function of the United States Power Squadrons are well stated in Article II of the national constitution, which reads in full as follows:

> "The objects of the United States Power Squadrons shall be to establish a high standard of skill in the handling and navigation of yachts; to encourage the study of the science of navigation and small boat

handling; to cooperate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the upbuilding of our Army, Navy, Coast Guard and Merchant Marine."

I am satisfied that the primary way in which the organizations fulfill these stated objectives is by the offering of a basic piloting course to the public. It is stipulated by counsel, and I so find, that this basic piloting course is widely advertised in such modes and in such places as are calculated to attract the attention of all persons who might be expected to have a boating interest. The course is given free to the public, which is encouraged to enroll for the purposes of learning the basics of boat handling and safety. The invitation to take the course is, without question, a broad and unlimited public one. The course is open to both men and women and, in fact, there is no qualification at all for free enrollment. One need not be a boat owner or able-bodied or have any other qualification other than a desire to take the course. It appears that the local squadrons of District IV conduct two such 8 to 10 week piloting courses annually, usually in public facilities, and more particularly in public schools. The courses are taught by instructors who are typically not only members of the squadrons, but members of the membership or admission committees of the local squadrons. On a nationwide basis, approximately 60,000 to 70,000 persons enroll in the courses annually. The complainant testified that at the time she enrolled in the Palisades Power Squadron piloting course, she was, in fact, unaware that there was any other similar course available from any other source. She successfully completed the piloting course in January,

1970 and was awarded a certificate so indicating. This certificate, designated "Woman's Certificate of Qualification", is granted by the national organization rather than by the local, which gives the course, and by national constitution provision, which expressly does not entitle the holder thereof to any of the benefits of membership. A male who passes the examination and is admitted to membership is not given a qualification certificate, but rather simply a membership certificate noting, inter alia, that he has passed the piloting course.

While the basic piloting course is the most significant way in which the power squadrons seek to achieve their stated objectives, they engage in other efforts designed to advance these objectives. Thus, the squadrons offer a number of more advanced courses in such areas as seamanship, navigation, advanced piloting, engine maintenance and marine electronics. These courses are available, however, only to power squadron members, and, in most districts, also to non-member women who have passed the basic piloting course. The power squadrons, as one of their more important activities, conducts a cooperative charting program in cooperation with the Coast and Geodetic Survey of the Environmental Science Services Administration of the United States Department of Commerce. This cooperative program is one which, I find from the facts, is endorsed, acknowledged and sponsored by the federal agency, is widely participated in by the squadron membership, and is regarded as a source of pride and prestige by the squadrons.

In further implementation of their objectives, the squadrons engaged in a number of other educational functions and services. The districts and the individual local squadrons participate, for example, in various public demonstra-

tions during the annual National Safe Boating Week. The demonstrations of the local respondent here took place at governmentally owned facilities and were performed in conjunction with public agencies, including, for example, Coast Guard and police groups. The locals and districts also conduct educational seminars at such governmental facilities as the national merchant marine and maritime colleges. The specific district educational conference as to which there were proofs at these hearings was one conducted by respondent, District IV, at Fort Schuyler, New York, which included seminars in oceanography and, apparently, visits to the merchant marine training ship owned by New York State. Non-member women are not generally invited to attend these educational conferences, although there was some proof that after complainant protested her exclusion from the District IV conference, she was reluctantly advised that she might, and as the only woman, attend.

Within the last several years, the United States Power Squadrons, in conjunction with the National Broadcasting System prepared for TV viewing without commercial sponsorship and as a public service, a series of one-half hour television programs on boat handling and safety, which were broadcast nationally. These programs were apparently similar in instructional format to the power squadron courses and were, in fact to a large extent, televised classes given by United States Power Squadrons' personnel in United States Power Squadrons' uniforms.

It should be further noted that the governing board of the national includes as regular honorary members federal officials and Commandants of the National Maritime Services. It is further pointed out that the close cooperation between the power squadrons and all levels of gov-

ernment is demonstrated by such activities as the undertaking by local squadrons of the training of various groups of state and local officials in small boat handling and safety. It is further noted that federal government officials regularly attend squadron meetings and speak and lecture at squadron meetings.

There is very little question, and I so find, that there is a strong identification in the mind of the boating public between the United States Power Squadrons and boating skill, proficiency and safety, and between the United States Power Squadrons and some form and extent of governmental and official aura. Members of the power squadrons may fly the power squadron flag, known as the Ensign, which has developed a substantial prestige among boatmen. In a bulletin published by the United States Power Squadrons and distributed to the boating public at large (See Exhibit HE-1), this flag is described as follows:

> "It is an outward and visible sign that the boat displaying it is under the charge of a capable person who has made a study of piloting and small boat handling and will recognize the rights of others and the traditions of the sea. The Squadrons flag marks a craft also as being under the charge of a man who has met certain minimum requirements and is so honored for meeting them. This honor may not be bought or sold, rented, loaned or given away."

I further find from the evidence that the Ensign may be flown by any member and that a member need not have taken any educational course other than the basic piloting course, which, of course, is open to the public generally. A woman, however, who has passed the basic piloting

course cannot fly the Ensign, even if she has passed all of the available advanced courses as well.

The power squadrons also have a series of insignia and merit marks, which indicate proficiency in specific aspects of boating, and which are awarded upon course completion. These insignia apparently are both uniform insignia and vessel insignia and the success and prestige of the United States Power Squadrons is such that the person displaying them is announcing to the boating public that he has achieved a particular degree of proficiency in a particular field. Again, women may not display these insignia despite their sucessful course completion.

While I find that the educational function of the United States Power Squadrons is its raison d'etre, and while this raison d'etre is primarily achieved through the offering to the public of the free basic piloting course, which is enrolled in by thousands of persons annually, it is nevertheless true that the squadrons sponsor a variety of social functions throughout the year as well. These social functions, almost all of which are open to women as guests, are primarily by way of dinner-dances and other such entertainments as well as boating activities participated in by the local squadron membership. These boating activities are frequently conducted at public marinas, that is to say, governmentally-owned boating facilities. The locals also have regular business and committee meetings preceded or followed by "stag" dinners or cocktail hours. I find, however, that while different locals apparently lay different degrees of emphasis on the nature and importance of these social activities, there is no question but that they are exclusively supportive in concept and purpose of the stated educational objectives of the organization and have no independent significance. So collateral, in fact, are

these social functions to the main purposes and objectives of the squadrons, that those locals, which apparently were tending to misconstrue and overemphasize the social role, were warned in a published article by the then Chief Commander of the national that:

> "• • • our mission has been to teach Safety in Boating, Seamanship, etc.—not to be a fellowship and club organization. Having grown as we have and having become the oldest, the largest and even the most influential, we have the responsibility to push our mission widely and well; to do so requires a well organized membership. There is no reason to feel you do not belong."

It is further pointed out that while the national constitution and all of the individual by-laws and other documents of the squadrons are highly detailed documents that deal with the public educational work of the squadrons, their areas of governmental cooperation and matters of internal administration and committee work, they are virtually silent as to any social aspects of the organizations.

Respondents resist what appears to be the inevitable conclusion which must be drawn from the nature of the activities of the power squadrons and from the extent of their public involvement by insisting that they retain their purely and distinctly private nature as "associational preference" clubs. They further insist that their invitation to membership is not a public one, but one made to specific individuals after careful screening and by a highly selective process. I find the following, however, to be the operative facts regarding the membership practices and policies of the squadrons. First, the squadrons have no membership limitation. The testimony made clear that the typical

number of members of a local squadron is between 150 and 200. The respondent, Palisades Power Squadron, which rejected complainant on the ground of her sex, had at that time about 550 members. The acknowledged manner in which the squadrons absorb their increasing numbers of members is simply by splintering into two or more separate locals whenever the membership number of one local becomes unwieldy.

The next question then is how this unlimited membership is recruited. The national constitution, in Article VI, Section I, provides that membership is available to male citizens, 18 years or over, who have passed the prescribed examination and who is thereafter elected to membership. This prescribed examination which is mandated by the national constitution, is, in fact, the examination given at the conclusion of the basic piloting course to which the public has been generally invited, and, which, itself is undisputedly and undeniably a public accommodation. Thus, members are not only solicited by the squadrons from among the enrollees in the piloting course, but moreover and more significantly the piloting course constitutes the sole recruitment ground for membership. I am persuaded by the evidence that it is the practice and intention of the local squadrons, consistent with national membership policy, to make conscious and deliberate efforts during the conduct of the piloting course to solicit the interest of the enrollees therein in becoming members of the local squadron. Indeed, the national membership manual sets forth detailed procedures and timetables by which enrollees in the piloting course are to be stimulated to desire and accept membership in the squadron. The membership manual states unequivocally that:

> "Ideally, every graduate of the piloting course should become an active member of United States Power Squadrons because he has sought an interest in boating education."

The locals have membership committees, which are charged with the obligation of selecting candidates for membership among the male enrollees of the course. The testimony offered by the respondents would seem to suggest that such factors as social compatability are extremely important in the determination by the membership committees of whom to invite. I find, however, that while there are different "screening" procedures used by the various locals, the main screening process is based not upon the desire of the power squadron to have a particular male enrollee as a member, but is rather based upon the enrollee's desire to become a member of the squadron. Thus, those officers of the respondents who testified to the effect that membership is *not* routinely offered to all male enrollees who pass the examination, were, in fact, hard pressed to be able to remember specific incidents over the past years where men who had passed and desired membership were not invited to become members, and, in fact, only one or two such incidents over the past ten years could be recalled. Thus, while an interviewing process in member selection was stressed, it is clear to me that the main purpose of the interview, at least in the respondent squadron, was not to determine if the squadron wanted the prospective member, but rather to determine whether or not the prospective member wanted the squadron.

At about the time of the hearing in this matter, the national organization had initiated a new reporting form to be completed by the various districts respecting membership recruiting efforts of their member locals. Included in the information required by these forms is a tally of the number of men passing each piloting course and the num-

Hearing Examiner's Recommended
Findings of Fact and Conclusions of Law

Based on the foregoing factual findings, the determination must now be made as to whether or not the United States Power Squadrons, national, district and the local here joined, are private exempt clubs or public accommodations. It is clear that the hallmark of a bona fide club, which is in its nature distinctly private and hence entitled to exemption under the laws against discrimination, is its status and character as a group founded, existing and operating for the purpose of advancing, protecting and preserving within a particular context, the associational preferences of its members. If the invitation to membership is made to the public at large, however, then the organization cannot be regarded as distinctly private in nature and its status must be concluded to be that of a covered public accommodation. I am satisfied from the findings heretofore made that, despite the appearance of selective invitation to membership which the respondents seek to stress, the respondents are, nevertheless, rendered public accommodations by virture of the fact that the base of squadron membership is the free piloting course itself, to which all members of the public are invited without regard to any qualification, whether sex, race, economic status, ablebodiedness or any other limitation and which is itself, and undeniably so, a public accommodation. Moreover, and almost without exception, every man who passes the basic piloting examination is invited to membership if he is of age and a United States citizen and has responded favorably to the membership selling job done by squadron officials during the conduct of the piloting course. It, therefore, appears, and I so find, that the membership invitation is basically as publicly oriented as is the public piloting course itself.

The private club exception to the public accommodation provision is an outgrowth of the constitutional right of

Hearing Examiner's Recommended
Findings of Fact and Conclusions of Law

association and is designed to protect organizations which are truly distinctly private and which truly owe their existence to the personal associational preferences of their members. Where, however, as here, an organization has engaged in activities which constitute an invitation to the general public or where the organization owes its existence not to its members' associational preferences, but rather to the coincidence of its members' interests in the facilities or other advantages offered by the organization, the private club exception does not apply and the organization is subject to the Law Against Discrimination. *Clover Hill Swimming Club v. Goldsboro*, 47 N.J. 25 (1966). Clearly, the power squadron members have come together because of the coincidence of their interest in boating and the advancement of boating skill and safety, rather than because of their affection, fondness or preference for each other's company.

It is further pointed out that the Court's holding in *Clover Hill* to the effect that the organization there in question was a public accommodation was based in large measure on the fact that it had engaged in extensive public advertising. The point in this context is that where an organization's continued success, growth and viability is dependent upon recruitment of members from the public at large, it cannot discriminate in its selection of members in contravention of the Law Against Discrimination. The same is clearly true here. Even though the recruitment of members is not from the public at large, it is from among that portion of the public at large which has elected to respond to the general invitation to take the free piloting course. When the course invitation is accepted, membership invitation to those who pass ordinarily follows -but only in the case of men.

The respondents argue that simply because they perform the public service of giving the basic piloting course to the public without charge, their other activities and their organizational existence should not thereby become subject to the public accommodation characterization. They argue that other well-known public service groups also perform public service without losing their private club characterization. The distinction between the activities of these other public service groups to which respondents refer and those of respondents is, however, essential—for it is by virtue of this very public service, namely the free piloting course, that the power squadrons are able to continue their existence because it is only from among the enrollees of these courses that they are, by virtue of their own constitution, able to recruit members. It must be concluded, therefore, that the piloting courses, which are admittedly themselves public accommodations, serve as the exclusive membership recruiting device. See *Clover Hill, supra.*, in its similar analysis regarding the ice skating safety advice published in newspapers by the allegedly private club there. And see also *Jones v. Haridor Realty Corp.*, 37 N.J. 384, 396 (1962).

Respondents also advance the contention that their organization is comprised of two separate and distinct aspects, namely the piloting course and the totally separate and uniquely private club, which is the subject of this hearing. It was demonstrated, however, that these two "separate" organizations are, in fact, so closely intertwined and interconnected as to be part of a single unitary operation. In such cases the entire entity is a public accommodation and is subject to the New Jersey Law Against Discrimination. In *Evans v. Ross*, 57 N.J. Super. 223 (App. Div. 1959); *cert. den.* 31 N.J. 292 (1960), the Appellate Division dealt with a similar defense on the part of an organization which operated an admittedly public dining room as well as several banquet and meeting rooms, which were alleged to be uniquely private. Observing that physically, operationally and financially the two allegedly "separate" entities were part of a single operation, the Appellate Division rejected the "private club" defense and held the entire organization to be a covered public accommodation. The same analysis is applicable to the organizational structure of the United States Power Squadrons. See also *Fazio Real Estate Co. v. Adams*, 396 F.2d, 146 (5th Cir. 1968); *Nesmith v. Young Men's Christian Ass'n. of Raleigh, N.C.*, 397 F.2d, 96 (4th Cir. 1968).

The federal courts, in construing the essentially similar public accommodations provisions of the federal civil rights legislation, 42 U.S.C.A. § 2000a, have delineated the indicia of an exempt private club in a manner essentially similar to the New Jersey cases construing the New Jersey legislation. Thus, in *Wright v. Cork Club*, 315 F. Supp. 1143 (S.D. Tex. 1970), the Court enumerated what may be regarded as minimum standards, all of which must be met by any organization alleging "private club" status. In order for an organization to constitute a "private club" it must at least:

1. have "permanent machinery established to carefully screen applicants for membership"; and

2. limit the use of its facilities and the enjoyment of its services strictly to members and bona fide guests of members; and

3. be controlled by the membership either through general meetings or some organizational form which enable the members to select from the membership

the officers who control and direct the organization; and

4. operate on a non-profit basis solely for the benefit and pleasure of the members; and

5. direct its publicity, if any, solely "to members for their information and guidance."

It is clear from considering the factual findings heretofore made that the respondents fail to meet all of these criteria. Their publicity is not limited to the guidance and information of its members, but rather is directed to the public at large; the operation of the respondents is not essentially for the benefit and pleasure of their members, but rather to educate the boating public at large and to serve the boating public at large; to a very large extent the facilities used by the power squadrons are not theirs, but those of various levels of government; and the membership invitation is a general public one.

And in *Nesmith v. Young Men's Christian Ass'n. of Raleigh, N.C., supra,* the Court suggested that a "public accommodation" characterization is clearly required where an organization has an open-ended membership roll and where the membership is not only unlimited, but also is large, having increased without substantial screening of applicants. Such is the case with the United States Power Squadrons, since as noted the organization is constantly growing. There was testimony that it hoped for a membership roll in excess of 100,000 in the near future. See also *Smith v. Young Men's Christian Ass'n. of Montgomery,* 316 F. Supp. (M.D. Ala. 1970).

SUMMARY

Having found as a matter of fact and of law that the United States Power Squadrons, that is the national, District IV and Palisades Power Squadron are public accommodations, the conclusion necessarily follows that their express practice of excluding women is in violation of the New Jersey Law Against Discrimination. I, therefore, find that an act of proscribed discrimination has been committed by all these respondents against the complainant, Marilyn C. Hinden.

The next question for consideration regards the remedies to which the complainant is entitled. It is, of course, my recommendation that the complainant be forthwith admitted into membership and accorded all of the privileges, accommodations and benefits thereof. I further recommend to the Director that his order require the elimination from the national constitution and the by-laws of all of the respondents the provisions restricting women from membership in the organization and barring them from the benefits thereof.

The final question is as to compensatory damages. Complainant seeks only "humiliation damages." Prior to the submission of these findings, the right of the Division to accord such damages was affirmed by the New Jersey Supreme Court in *Zahorian v. Russell Fitt Real Estate Agency,* 62 N.J. 399 (1973). In considering the damages question, I note that the complainant took the course with her husband, with whom she has shared an enthusiasm of boating during her entire marriage and with whom she shares the responsibility for the operation and maintenance of their motor yacht. Although, however, they worked side by side during the piloting course, when the course came to an end and both passed the examination, they

were treated quite differently and, according to her testimony, in a manner which was humiliating to her. Unlike her husband and indeed unlike every other male in the class who passed, she was not invited to membership in the United States Power Squadrons even though she obviously possessed all of the qualifications for power squadron membership. She also testified as to her humiliation in having been initially excluded from the District IV educational conference and further in her sense of resentment when having been invited to act as a proctor in the educational program, but as a non-member.

In view of the foregoing and the actual humiliation testified to by the complainant, it is my conclusion that compensatory damages be awarded for complainant's humiliation in the amount of five hundred ($500.00) dollars, to be paid by all three respondents, jointly and severally.

APPENDIX A2

Amended Findings, Determination and Order
(Dated June 7, 1974)

BY THE DIRECTOR:

A hearing in this matter was held before Sylvia B. Pressler, Esq., a Hearing Examiner for the Division on Civil Rights on April 27, 1971, April 28, 1971, April 29, 1971 and May 11, 1971. On June 1, 1973 the Hearing Examiner filed a report with the Director containing recommended findings of fact and conclusions of law.

In accordance with Rule 13:4-13:1 of the Division's Rules of Practice and Procedure, copies of the Hearing Examiner's report were sent to Deputy Attorney General David Litwin, Esq., as counsel for the Division, Bryant W. Griffin, Esq., of Moser, Griffin, Kerby and Cooper, Attorneys for Respondents United States Power Squadrons and George R. Hodell and Harry Mopsick, Esq., Attorney for Respondents Palisades Power Squadron, John Cornish, Albert J. Magee, Bruce Smith, Dean C. Potter and Harry Ball.

No objections to the Hearing Examiner's Recommended Findings of Fact and Conclusions of Law have been filed by the Office of the Attorney General on behalf of the Complainant. Objections were filed by Harry Mopsick, Esq., on behalf of the respondents United States Power Squadron, Palisades Power Squadron, John Cornish, Albert J. Magee, Bruce Smith, Dean C. Potter and Harry Ball, and said objections have been received and reviewed by me.

Findings, Determination and Order were entered on December 21, 1973, and a Supplemental Order was entered on January 17, 1974. On February 1, 1974, the respondents filed a Motion to Reopen Proceedings and Revise Order. These amended Findings, Determination

and Order reflect the determination and disposition of the Division on Civil Rights of said motion.

Having given careful and independent consideration to the entire record, including the transcript of the hearing and exhibits introduced at hearing, the objections of respondents herein, and cases cited as authority, I therefore adopt said Findings of Fact and Conclusions of Law as my findings of fact and conclusions of law except as may be otherwise noted herein and make same a part of this Order as though they were set forth in full herein. The application of this order shall affect respondents' operations in this State only.

I expressly find that the Division on Civil Rights has jurisdiction over respondents as places of public accommodation as defined in N.J.S.A. 10:5-5(1). Respondents denied membership opportunity to the complainant, notwithstanding her successful completion of the basic pilot course offered by the United States Power Squadrons. Said denial was an act of proscribed sex discrimination in violation of the public accommodation provision of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-12(f). As a result of said discrimination, complainant suffered mental pain, suffering, and humiliation.

Respondent's motion to reopen proceedings on an allegation that "the record in this case inaccurately reflects the degree of social activities (as compared to educational activities) actually carried on by the respondents" is denied. The record demonstrates that adequate opportunity was given to respondents to fully present their case at public hearing and no proffer has been made to show why said hearing should, in fairness, be reopened.

Respondents also attempt to reopen the hearing based upon their allegation that they have revised their membership procedures "since the last date of hearing in this matter" and contend that their subsequent revisions would mean that respondents "are not subject to the . . . law (against discrimination)." Even assuming said revisions have been made (no affidavit or sworn statement was submitted to this effect), respondents cannot be permitted to evade or avoid the clear application of the Law Against Discrimination by procedural manipulations subsequent to public hearing. Consequently, this Order shall rely upon the facts as presented at public hearing and shall be deemed a Final Determination. Proffer of subsequent modifications can be no basis to stay enforcement of this Order.

No prima facie evidence has been offered to show that alleged policy revisions are based entirely upon non-discriminatory considerations. Since the facts adduced at public hearing establish a clear policy of discrimination, respondents' alleged policy modifications would, in any event, be inherently suspect, since they involve the substitution of an objective criteria ("successful completion of the course of instruction") by a subjective criteria ("comment by all members"). The Division

> " . . . cannot conceive of any lawful reason for the requirement of a vote of the membership . . . for admission of a new member thereto. The only rational reason for such a requirement is exclusion. The overall record contains substantial credible evidence to warrant the conclusion that such exclusion was motivated at least in part . . . [in this instance, by considerations of sex]." *Blair v. Mayor and Council of Bor. of Freehold*, 117 N.J. Super. 415, 417 (App. Div. 1971).

Accordingly, it is on this 7th day of June, 1974, hereby ORDERED that:

1. The complaint against the individual respondents shall be dismissed pursuant to the recommendation of the Hearing Examiner.

2. The remaining respondent, United States Power Squadrons and Palisades Power Squadron, shall forthwith cease and desist from doing any act prohibited by the Law Against Discrimination.

3. The respondents, United States Power Squadrons and Palisades Power Squadron, shall immediately change any and all policies, written and unwritten, in regard to exclusion of women and shall grant to women all the advantages, accommodations, privileges and facilities as heretofore offered to men.

4. The said respondent, United States Power Squadrons, shall send, within forty-five (45) days of receipt of this Order, notices to its Squadrons within this State that they shall consider for membership all persons regardless of sex based solely on the criteria heretofore utilized in the consideration of men for membership, i.e.: the named respondents shall extend membership invitation to women who express a desire to become members of the organization, except that, provided that such requirements continue to be demanded of men, it may be required that said women (1) successfully complete the basic course of instruction, and (2) successfully pass a standardized, objective interview. Said interview shall be sent to the Division on Civil Rights within forty-five (45) days of receipt of this Order. Said standardization should outline for interviewers questions to be asked of prospective members so as to make said interview as objective as possible, eliminating subjectivity which might operate to discriminate against prospective female members.

5. It is further ORDERED that respondents shall include in every advertisement, including, but not limited

to, television, radio, and in every brochure, pamphlet or poster, publicizing the United States Power Squadrons or any of its activities, a statement that such programs and activities are open to all individuals regardless of sex or race. In addition, the named respondents shall conspicuously post notices that they are a place of public accommodation, in all of their offices as provided by the New Jersey Division on Civil Rights Rules of Practice and Procedure 13:8-1.4.

6. The named respondents, the United States Power Squadron and the Palisades Power Squadron, jointly and severally, shall pay to the named complainant, Marilyn C. Hinden, the sum of Five Hundred ($500) Dollars, as compensatory damages for the mental pain, suffering and humiliation suffered by complainant as a result of the discrimination. Said damages shall be sent to the Division on Civil Rights within forty-five (45) days of the within Order.

7. In order to assure compliance with this Order, the United States Power Squadrons and the Palisades Power Squadron shall submit to the Division on Civil Rights for approval for a period of five (5) years, any and all new or modified criteria and/or rules. No rules may be effected within this time period which in any way affect the membership procedures of the respondents or the use of their accommodations, facilities, advantages or the privileges of membership.

Furthermore, for this same time period, the United States Power Squadrons will also submit on a yearly basis, commencing January 1, 1975, a statistical summary of the number of its male and female members in New Jersey and of its member squadrons within this State.

8. Any violation of the provisions of this Order by a

States Power Squadrons, and such penalties and/or relief as may be granted as a result of such a violation shall apply to both the offending local squadron and to the United States Power Squadrons.

9. Jurisdiction is retained by the Division on Civil Rights to observe and require compliance with this Order and to issue Supplemental Orders, if necessary, in accordance with the foregoing provisions of this Order.

APPENDIX B1

Opinion of the Superior Court of New Jersey, Appellate Division

(Decided July 18, 1975)

* * *

PER CURIAM

Mailyn C. Hinden filed a complaint with the Division on Civil Rights, charging that she had been denied membership in the appellant organizations solely on the basis of her sex, in violation of *N.J.S.A.* 10:5-1 et seq. Following a hearing, the hearing examiner submitted a report of her recommended findings of fact and conclusions of law, to which appellants filed objections. Thereafter the Director issued his Findings, Determination and Order. He adopted the findings and conclusions of the Hearing Officer and held that the denial of membership was an act of proscribed sex discrimination in violation of the public accommodation provision of *N.J.S.A.* 10:5-12(f).

The Director ordered appellants

(1) forthwith to change the qualifications in their constitution, by-laws, requirements, accommodations and privileges so as to eliminate sex discrimination; to disseminate instructions thereon and a notice of the order to their employees and members; and to send a copy of the written instructions and notice to the Division within 30 days;

(2) to extend membership invitations to women who have successfully completed the prerequisite courses, ex-

pressed a desire for membership, and successfully passed an interview; and

(3) to include in every advertisement and brochure, pamphlet or poster, a statement that such programs and activities are open to all individuals regardless of sex or race; and conspicuously to post notices in all appellants' offices that they are a place of public accommodation.

By a supplemental order appellants were directed to pay to complainant, Marilyn C. Hinden, the sum of $500 as compensatory damages for the mental pain, suffering and humiliation suffered by her as a result of the discrimination.

Appellants moved to reopen the proceedings for a rehearing and revision of the Order, seeking, among other things, a deletion of the word "race" in the third paragraph thereof. The motion to reopen was denied. An amended Finding, Determination and Order was issued by the Director in which these provisions were added: appellants were directed forthwith (a) to cease and desist from doing any act prohibited by the law against discrimination; (b) to change immediately any and all policies, written and unwritten, in regard to the exclusion of women; (c) to submit to the Division for approval for a period of five years any and all new or modified criteria or rules; and (d) with respect to United States Power Squadron, to submit on a yearly basis a statistical summary of the number of its male and female members in New Jersey.

Appellants contend on this appeal that (1) the Division lacks subject matter jurisdiction because appellants are not places of public accommodation; (2) the Division's applica-

tion of the law to appellants interferes with freedom of association; (3) appellants are private clubs exempt from the law against discrimination; (4) the Director exceeded his authority and abused his discretion; (5) the Director's refusal to reopen the proceedings to admit new evidence denied appellants the right to become a private club, and to exercise their constitutionally protected freedom of association; and (6) the record does not support a damage award for mental pain, suffering, and humiliation.

We have thoroughly reviewed the record in this case and conclude that, with one exception, the action taken in the Division should not be disturbed. It is noted that the Third paragraph of the Director's original Findings, Determination and Order required appellants to include in every advertisement, and in every brochure, pamphlet or poster, a statement that its programs and activities were open to all individuals regardless of sex and race. Appellants were not charged with any act of discrimination because of race, and it seems to us that the third paragraph contains an unfair and unjustified implication that they had violated the statute in that regard. Accordingly, the order will be modified by deleting from that paragraph any reference to race.

In all other respects, we affirm the Director's order, as supplemented and amended, essentially for the reasons expressed by him in his findings and determination. We are satisfied that the decision below was supported by sufficient credible evidence in the record as a whole. See also *Nat. Org. for Women v. Little League Baseball*, 127 N.J. Super. 522 (App. Div. 1974), aff'd by mem. ___ *N.J.* ___ (1974). We

are also of the view that the Directors' denial of appellants' motion to reopen the proceedings did not constitute a mistaken exercise of discretion on his part.

As modified, the order below is affirmed.

APPENDIX B2

Order Denying Petition for Rehearing

(Filed July 9, 1975)

* * *

This matter having been duly presented to the Court, it is hereby ordered as follows:

Petition for Rehearing – DENIED.

Supplemental:

I, **ELIZABTH McLAUGHLIN,** Clerk of the Superior Court of New Jersey, Appellante Division, do hereby certify that the foregoing is a true copy of the original on file in my office.

For The Court:

Witness, The Honorable LEON LEONARD, Presiding Judge of Part C, Superior Court of New Jersey, Appellate Division, this 7th day of July 1975.

APPENDIX C1

IN THE

SUPREME COURT OF NEW JERSEY

September Term 1975

No. .....

On Petition for Certification

MARILYN C. HINDEN, et al,

Complainant-Respondent,

vs.

UNITED STATES POWER SQUADRONS, et al,

Respondents-Petitioners.

To Appellate Division, Superior Court;

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 10th day of December, 1975.

APPENDIX C2

New Jersey Supreme Court Dismissal of Appeal

Item 13 of Record filed sub nom

Hinden et al

v.

United States Power Squadrons et al

APPENDIX D

IN THE

SUPREME COURT OF NEW JERSEY

DOCKET NO. A-3104-73

Notice of Appeal to The Supreme Court of The United States

MARILYN C. HINDEN, VERNON H. POTTER,
ACTING DIRECTOR, DIVISION ON CIVIL RIGHTS,

Complainants-Respondents

v.

UNITED STATES POWER SQUADRONS;
PALISADES POWER SQUADRON

Respondents-Appellants

Notice is hereby given that United States Power Squadrons, a New Jersey membership corporation, and and Palisades Power Squadron, a New Jersey membership corporation, the respondents-appellants above named, appeal to the Supreme Court of the United States from the final order of the Supreme Court of the State of New Jersey, entered on December 10, 1975, denying review of the judgment of the Superior Court of New Jersey, Appellate Division, affirming a determination by the New Jersey Division on Civil Rights adverse to respondents-appellants.

This appeal is taken pursuant to 28 United States Code 1257 (2).

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Of Counsel

Date: January 2, 1976

APPENDIX D2

Supreme Court of the United States

No. A-756

PALISADES POWER SQUADRON, et al.,

Petitioners

V.

MARILYN C. HINDEN, et al

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 8, 1976

/S/ William J. Brennan, Jr.

Associate Justice of the Supreme Court of the United States

Dated this 4
day of March, 1976.

APPENDIX E

New Jersey Statutes Annotated — Chapter 5
Law Against Discrimination — 4/16/45

10:5-4 All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodations, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

10:5-5l "A place of public accommodation" shall include, but not be limited to: any tavern, roadhouse, hotel, motel, trailer camp, summer camp, day camp, or resort camp . . .; any producer, manufacturer, wholesaler, distributor, retail shop, store, establishment, or concession dealing with goods or services of any kind; any restaurant, eating house, or place where food is served for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, any stations and terminals thereof; any bathhouse, boardwalk, or seashore accommodation; any auditorium, meeting place, or hall; any theatre, motion picture house, music hall, roof garden, skating rink, swimming

pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor, or other place of amusement; any comfort station; any dispensary, clinic or hospital; any public library; and kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education . . . Nothing herein contained shall be construed to include or apply to any institution, bona fide club, or place of accommodation which is in its nature distinctly private . . .

APPENDIX F

1. First Amendment, United States Constitution

AMENDMENT I. FREEDOM OF RELIGION, SPEECH, PRESS, ASSEMBLY AND PETITION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Fourteenth Amendment, United States Constitution

AMENDMENT XIV. RIGHTS OF CITIZENS

Section 1. Citizenship; privileges and immunities; due process; equal protection . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
MAY 26 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1553

UNITED STATES POWER SQUADRONS,
PALISADES POWER SQUADRON,

Appellants,

vs.

MARILYN C. HINDEN, DIVISION ON CIVIL RIGHTS,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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TABLE OF CONTENTS

	PAGE
MOTION TO DISMISS	1
QUESTION PRESENTED	2
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT—The appellants have not presented a substantial constitutional issue entitling them to appeal, because this case simply involves the factual application of detailed criteria as to the definition of a public accommodation, implicit in which is the recognition that freedom of association does not permit public entities to deny membership to persons or groups protected by anti-discrimination statutes	7
CONCLUSION	14

Cases Cited

Bell v. Maryland, 378 U.S. 226 (1964)	11
Clover Hill Swimming Club, Inc. v. Goldsboro, 47 N.J. 25, 219 A.2d 161 (1966)	8, 11
Evans v. Ross, 57 N.J. Super. 223, 154 A.2d 441 (App. Div. 1959), *certif. den.* 31 N.J. 292, 157 A.2d 362 (1960)	10
Eveo v. Jones, 409 U.S. 91 (1972)	7, 10
Fraser v. Robin Dee Day Camp, 44 N. J. 480, 210 A.2d 208 (1960)	10
Gibson v. Florida Legislative Committee, 372 U.S. 529 (1963)	11

PAGE

Jones v. Haridor Realty Corp., 37 N.J. 384, 181 A.2d 481 (1962) 11

Local Union No. 1 v. Graham, 375 U.S. 192 (1952) 7

Moose Lodge v. Irvis, 407 U.S. 163 (1972) 11

N.A.A.C.P. v. Alabama, 357 U.S. 388 (1958) 11

N.O.W. v. Little League, 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974) aff'd sum. 67 N.J. 320, 338 A.2d 198 (1974) 8

Nesmith v. Y.M.C.A. of Raleigh, 397 F.2d 96 (4th Cir. 1968) 8, 13

Sigma Chi Fraternity v. Regeants of University of Colorado, 258 F.Supp. 515 (D.Col. 1966) 11

Smith v. Y.M.C.A. of Montgomery, 316 F.Supp. 899 (N.D. Ala. 1970), mod. 462 F.2d 634 (5th Cir. 1972) 8

Sullivan v. Little Hunting Park, 396 U.S. 229 (1969) 8

Tillman v. Wheaton-Haven Recreational Association, 410 U.S. 431 (1973) 7, 8, 13

U.S. v. International Longshoremen, 460 F.2d 497 (4th Cir. 1972), cert. den. 409 U.S. 1007 (1972) 12

Statutes Cited

Title II of the 1964 Civil Rights Act, 42 U.S.C.A. 2000(a) 7, 8

N.J.S.A. 10:5-1 7

Rule Cited

Rule 16(1)(b) 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1553

UNITED STATES POWER SQUADRONS,
PALISADES POWER SQUADRON,

Appellants,

vs.

MARILYN C. HINDEN, DIVISION ON CIVIL RIGHTS,

Appellees.

On Appeal from the Supreme Court of New Jersey

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

Motion to Dismiss

Pursuant to Rule 16(1)(b) of this Court, the Attorney General of the State of New Jersey, on behalf of appellees, hereby moves to dismiss this appeal on the grounds that it does not present a substantial federal question.

Question Presented

Is a state statute which prohibits sex discrimination in the membership practices of places of public accommodation repugnant to the First Amendment of the United States Constitution?

Counter-Statement of the Case

United States Power Squadrons ("USPS") is a non-profit organization (2T. 218-16 to 17)* with headquarters in Montvale, New Jersey (1T. 119-20 to 1T. 120-2), the objects of which:

> "shall be to establish a high standard of skill in the handling and navigation of yachts; to encourage the study of the science of navigation and small boat handling; to co-operate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the up-building of our Army, Navy, Coast Guard, and Merchant Marine," 1970 Constitution of USPS, Article II (Aa48).**

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* Because the pages of the transcript of the hearing below are not numbered consecutively from volume to volume, they will be referred to as follows: The transcript of April 27, 1971, will be referred to as 1T; the transcripts of April 28, 29 and May 11, 1971 will be referred to as 2T, 3T, and 4T, respectively. These transcripts have been certified to this Court as part of the record below.

** This notation refers to the appendix filed by USPS with the Superior Court of New Jersey, Appellate Division, which was certified to the Court on February 10, 1976.

Palisades Power Squadron is one of the New Jersey divisions of USPS, the purposes of which are the same as those of the national organization. USPS offers a free basic piloting course which is open to any member of the general public, women as well as men, who wish to take it (1T. 32-1 to 3). This course, which Mrs. Hinden, the party complaining in the New Jersey Division on Civil Rights ("Division"), took and passed, is designed to impart knowledge in boat handling and piloting (1T. 36-6 to 10; 1T. 43-23 to 1T. 44-1). In additional fulfillment of its purposes, the organization offers advanced courses, promotes and participates in National Safe Boating Week and aides the United States Coast Guard in up-dating navigation charts and publishing a boating manual (Ra1 to Ra2).*

USPS engages in extensive advertising and public relations activities as an aid to the accomplishment of these purposes. In conjunction with the National Broadcasting Company, USPS has sponsored a television program which offers information about the organization as a public service (1T. 185-5 to 1T. 186-41). In the November, 1970 issue of "The Ensign", USPS's house organ, is an article entitled "Report of the Executive Department" (Ra1 to Ra2) which lists among the most important functions of the organization: (1) the cooperative charting program in which USPS through its local squadron members, cooperates with and aids the United States Coast Guard in constantly adjusting and correcting navigational charts of the nation's waterways; (2) the general promotion of safety and National Safe Boating Week; (3) "Governmental Liaison" work in order that "our name,

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* This notation refers to the appendix filed by the Division on Civil Rights with the Superior Court of New Jersey, Appellate Division, which was certified to the Court on February 10, 1976.

purposes and activities become increasingly well known in high places," as well as the work of the "Legislative Committee" which is constantly "working behind the scenes for the best interests of pleasure boatmen, . . . and meeting with individuals and State and National groups discussing these important legislative actions"; (4) public relations, specifically in that the Public Relations Committee is "making every attempt to see that USPS gets proper recognition for public consumption," and boosting the USPS in the "U. S. Treasury Department Safety Bulletin," "Business Management Magazine", and "Sports Illustrated" which are "a few examples of the continuous efforts of this Committee to enhance the prestige and growth of our organization"; (5) other governmental liaison work in that the Radio Technical Committee has "meetings at least monthly with the Coast Guard and U.S. Safety of Life at Sea Committee to insure full knowledge and consideration of USPS members and the general public's interest in rules and international agreements covering small boat use of radio and other electronic devices".

By its own admission, USPS has never considered itself a private social organization. While the group does sponsor a number of social activities for its members, the Chief Commander noted in November of 1970 that:

> ". . . over all the years our mission has been to teach safety in Boating, Seamanship etc.—not to be a fellowship and club organization" (1T. 178-23 to 1T. 179-7).

USPS and the locals often make use of public school facilities in conjunction with their teaching the basic piloting course. In addition, organization conferences are held at times on facilities owned by the Federal and various state governments (3T. 12-25 to 3T. 13-11). Public

marinas are used for certain activities (1T. 65-25 to 1T. 66-7).

Article IV of the 1970 Constitution of USPS provides further:

> "The Governing Board shall consist of the Chief Commander . . . and representatives of such Departments of the United States Government as may be elected by the Governing Body as *governmental* members thereof." [Emphasis added] (Ra4)

Thus, officials of government sit as members of the Governing Board of USPS in their official capacities, not as private citizens. In the December, 1970 issue of "Motor Boating" magazine, a general circulation publication, it is noted that nine officials of the United States Coast Guard and Navy were elected ". . . as Government Members of the USPS Governing Board. . . . This boosted to over 50 the number of senior military officers, who, in the words of the Chairman of the Governmental Liaison Committee 'lend their prestige to USPS work, increasing the pride the members have in the value of their membership and volunteer work. Liaison, mutual respect, and cooperation are encouraged, and the service rendered to the boating public enhanced.'" (Ra5)

All of the activities of USPS and Palisades, other than the basic piloting course and some of the advanced courses, are limited to the membership, the qualifications of which are: "Any male person, 18 years of age or over, having sufficient nautical knowledge, who is a citizen of the United States of America and who passes the prescribed examination. . . ." (Aa49). At the time of the hearing, a very large majority of the men who fit these qualifications was invited to join (4T. 13-24 to 4T. 30-23). Women may attend most functions of USPS and Palisades only as guests of members (2T. 294-14 to 15).

Complainant Hinden enrolled in the basic piloting course offered by petitioners. After completion of the course, she was asked by a member of Palisades if she would like to proctor future classes. She asked if she could join the organization and was told women could not. She thereupon refused to proctor (1T. 41-23 to 1T. 42-5). Thereafter she attended a ceremony at which all of the men who had passed the course at the same time as she had were sworn in as members of USPS and Palisades (1T. 46-24 to 25), while she and the other women who had passed were given "Woman's Certificates" stating specifically, "The granting of a Woman's Certificate does not confer upon the holder the right to fly the ensign of the United States Power Squadrons nor any rights of membership whatsoever" (1T. 43-17 to 22). After receiving the Woman's Certificate, complainant enrolled in an advanced course given by Palisades (1T. 54-8 to 10) wherein it was announced that an educational conference for members was to be held at Fort Schuyler under the auspices of the City University of New York, Maritime College (1T. 55-5 to 19). She asked if she could go and was told that no women were allowed to attend (1T. 56-9 to 17). Subsequent to this she filed a complaint with the Division on Civil Rights (Aa1).

ARGUMENT

The Appellants have not presented a substantial constitutional issue entitling them to appeal, because this case simply involves the factual application of detailed criteria as to the definition of a public accommodation, implicit in which is the recognition that freedom of association does not permit public entities to deny membership to persons or groups protected by anti-discrimination statutes.

The question presented, simply stated, is whether a state statute may prohibit an entity which has been held to be a place of public accommodation in accordance with detailed state and federal criteria from discriminating in membership policies against statutorily protected groups.

The decision of the New Jersey Division on Civil Rights, upheld by the New Jersey Superior Court, Appellate Division, concerning which certification was denied by the Supreme Court of New Jersey, was grounded upon extensive factual findings that appellants are places of public accommodation within the meaning of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 *et seq.* These findings must of course be accepted on appeal to the Court unless they lack a reasonable basis in the evidence. *Evco* v. *Jones,* 409 U.S. 91, 94 (1972); *Local Union No. 10* v. *Graham,* 345 U.S. 192, 197 (1952).

Decisions under both the New Jersey Law Against Discrimination and Title II of the 1964 Civil Rights Act establish conclusively that membership organizations which have been factually established as being public accommodations as opposed to private clubs, may not discriminate against statutorily protected groups in their membership admissions practices. *Tillman* v. *Wheaton,* 410 U.S. 431

(1973), *Smith* v. *Y.M.C.A. of Montgomery,* 316 F.Supp. 899 (N.D. Ala. 1970), mod. 462 F.2d 634 (5th Cir. 1972); *Nesmith* v. *Y.M.C.A. of Raleigh,* 397 F.3d 96 (4th Cir. 1968); *Clover Hill Swimming Club, Inc.* v. *Goldsboro,* 47 N.J. 25, 219 A.2d 161 (1966); *N.O.W.* v. *Little League,* 127 N.J. Super. 522, 318 A.2d 33 (App. Div. 1974) *aff'd sum.* 67 N.J. 329, 338 A.2d 198 (1974). The most notable case dealing with criteria for determining whether an organization is a public accommodation is *Tillman* v. *Wheaton-Haven Recreation Association,* supra, involving a non-profit corporation, the sole purpose of which was to operate a swimming pool and related amenities. Membership was limited in number and majority approval of a board of directors or of the general membership was required before an applicant could be admitted to membership. Only members and their guests could be admitted to the pool. The organization performed no public or "charitable" purpose. Yet this Court held that the association was a public accommodation under Title II of the 1964 Civil Rights Act, 42 U.S.C.A. 2000(a) reversing both the Court of Appeals and the District Court, for the reason that "membership 'is open to every white person within the geographic area, there being no selective element other than race'," 410 U.S. at 438, quoting from *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 234 (1969).

Similarly, the finding of the New Jersey Division on Civil Rights established that membership in USPS has always been open to virtually any and all men proclaiming interest in the organization upon their passing a basic piloting course while all women passing the same course are automatically excluded. Thus, USPS policies have comported with neither this Court's prerequisite for private clubs, nor those of the Supreme Court of New Jersey which held in *Clover Hill Swimming Club* v. *Goldsboro,* 47 N.J. 25, 34, 219 A.2d 161, 166 (1966):

> "The statutory exemption for distinctly private organizations is designed to protect the personal associational preferences of their members."

Significantly, as the stated purposes of USPS indicate, the reason for its existence is not solely or even substantially for the personal associational preferences of its members. As noted in Article II of the May 1970 Constitution of USPS:

> "The objects of the United States Power Squadrons shall be to establish a high standard of skill in the science of navigation and small boat handling; to cooperate with the agencies of the United States Government charged with the enforcement of the laws and regulations relating to navigation and to stimulate interest in activities which tend to the up-building of our Army, Navy, Coast Guard, and Merchant Marine." (Aa48).

The purposes of USPS have been expounded upon in articles of *The Ensign,* the official magazine of USPS, an example of which is quoted in the Counter-Statement of the Case, supra. Clearly then, the essential purposes of USPS do not relate in any substantial manner to personal associational preferences of members. Rather, any interested male having passed the minimum qualifying course has had the opportunity to join.

Appellants' assertion concerning the importance of personal compatability of members is further undercut by its own long-standing membership guidelines. Although "quality" of membership is mentioned in the "Procedural Manual for Membership Committees" quality is of concern primarily in relation to whether a member will help foster the publicly oriented work of the organization. The manual states:

> "Ideally EVERY GRADUATE of the Piloting Course should become an active member of USPS because he has shown an interest in boating education. If we hope to succeed in encouraging a high standard of skill among the millions of recreational boating people, we must have growth. However, (and this is most important) experience has demonstrated that the QUALITY of our membership is far more important than sheer numbers. In the long term, the quality of YOUR membership will present either a good or a bad Squadron image to your community." (Ra7) (Emphasis in original).

Furthermore, *Fraser* v. *Robin Dee Day Camp,* 44 N.J. 480, 210 A.2d 208 (1960), properly notes that in a public accommodation with closely interdependent units, all must be considered part of the organization for purposes of their being covered by the Law Against Discrimination. *See also Evans* v. *Ross,* 57 N.J. Super. 223, 229-230, 154 A.2d 441, 445 (App. Div. 1959), *certif. den.* 31 N.J. 292, 157 A.2d 362 (1960). In the case at bar, it is clear that the free basic piloting course, through which USPS accomplishes many of its purposes (Aa6), is inextricably enmeshed in the structure of the entire organization. It is in fact from this course that USPS has always gleaned all of its members and advertised various of its other activities (1T. 34-13 to 17; 38-13 to 18). Thus, even assuming part of its structure has some indicia of privateness, because of the public nature of its piloting course and its importance to USPS as a whole, the entire organization must be considered a public accommodation. It is thus abundantly clear that the finding below that USPS is a public accommodation was grounded upon a substantial factual record which, therefore, should not be disturbed by this Court, *Evco* v. *Jones, supra.*

Clover Hill v. *Goldsboro,* 47 N.J. 25, 34, 219 A.2d 161, 166 (1966) notes further that, "Self-serving declarations by the owner of an accommodation are not determinative of its character . . . In *Jones* v. *Haridor Realty Corporation,* 37 N.J. 384, 396 [181 A.2d 481, 487] (1962), we said: 'No device, whether innocent or subtly purposeful can be permitted to frustrate the legislative determination to prevent discrimination'." Thus, USPS cannot presently render itself immune from the Law Against Discrimination simply by proclaiming itself a private club when the totality of its structure and purposes have always been of a public nature.

The cases cited by appellants are simply inapposite. The dicta in *Bell* v. *Maryland,* 378 U.S. 226 (1964) and *Moose Lodge* v. *Irvis,* 407 U.S. 163 (1972) which notes a right of exclusion in one's home or private club assumes that a private club does in fact exist. A factual finding precisely to the opposite has been made in this case. In *N.A.A.C.P.* v. *Alabama,* 357 U.S. 488 (1958), the Court's prohibition of State interference was based on the State's failure to justify its need for the membership list in light of the repressive effect disclosure of membership would have had on the group. *Gibson* v. *Florida Legislative Committee,* 372 U.S. 539 (1963), rests on a similar fact foundation. Neither case involved the issue of an organization's right to exclude a statutorily protected group from membership.

In fact, courts have explicitly recognized limitations to the right of free association. In *Sigma Chi Fraternity* v. *Regents of University of Colorado,* 258 F.Supp. 515, 525 (D.Colo. 1966) it was held that college fraternities' freedom of association was not injured by a college regulation prohibiting discrimination on the bases of race, color or religion. After examining many of the cases upon which Appellants rely herein, the court noted: "It is

clear from an examination of these cases that the right of association is not, as plaintiffs have contended, an absolute right but is always subject to evaluation in relation to the interest which the state seeks to advance." In *U.S.* v. *International Longshoremen,* 460 F.2d 497, 501 (4th Cir. 1972), cert. den. 409 U.S. 1007, (1972) union officials opposed the merger of black and white locals. The court stated:

> "Their principal argument against the district court's decree is the claim that merger of the locals infringes on the workers' right to the freedom of association guaranteed them by the first amendment. This argument misapprehends the court's order. Merger will not prevent longshoremen from association to achieve economic and political goals. The order does no more than prohibit exclusion from association on the ground of race. There is no warrant in the Constitution for a union to retain, even by majority preference, racially segregated locals that tend to deprive some black members of equal employment opportunity. . . . The district court's order does not conflict with *NAACP* v. *Alabama,* 357 U.S. 499, 78 S.Ct. 1163, 2 L.Ed. 2d 1488 (1950), and *Thomas* v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945), on which the union primarily relies. These cases do not create a right in white men or black men to avoid association with persons of the other race. On the contrary they are leading authorities charting the right of all persons to associate for political and economic goals."

It is apparent, therefore, that no constitutional right of freedom to exclude based on sex exists for USPS which has been factually found to be a public accommodation.

Finally, USPS's desire to change some of its rules regarding membership procedures so as to "become" a private club is simply a clear effort to evade the Law Against Discrimination through subterfuge. It must be remembered that the issue of whether an organization is a public accommodation or a private club is substantially one of fact.* While an establishment may have some of the trappings of a private club, the totality of its organization and purpose is determinative of its true nature, *Tillman* v. *Wheaton-Haven Recreation Association,* supra, *Nesmith* v. *Y.M.C.A. of Raleigh,* 397 F.2d 96, 101 (4th Cir. 1968). Given this, in light of the totality of USPS's organization, its procedures, the publicity it generates, its links with government, concerning which extensive findings of fact were rendered at the hearing level, USPS cannot "become" a private club simply by purporting to change some of its membership practices.

This is not to say, of course, that should USPS cease to be that which it is, a public organization found and maintained to teach and foster boating safety and generally promote the interests of the boating public, it could not thereby become a private organization. It is clear from the briefs filed in this Court and below, however, that USPS has no intention of changing the basic character or purpose of the organization, which, in the very words of its Chief Commander is "to teach safety in Boating, Seamanship, etc.—not to be a fellowship and club organization."

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* It might also be noted at this juncture, and reemphasized as well, that this case involves only the facts surrounding the operation of USPS and not the Moose, Elks, Lions, New York Athletic Club, etc. Since a case involving any of these or any other organization would stand or fall on its own facts, USPS's exhortations that the Court save such organizations from governmental incursion into their privacy by noting probable jurisdiction herein is simply falsely premised.

It is thus clear that the Director's order prohibiting the implementation of stricter membership requirements for a limited period and providing that the standards formerly applied to men shall be applied equally to women, simply seeks to insure that USPS shall not evade said order by altering its membership criteria in a way which would have the effect of excluding women in an unlawfully discriminatory manner (Aa39 to 40). USPS cannot put on the robes of privacy for purposes of discriminating while essentially continuing to function in all other aspects as a public entity.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the appeal should be dismissed for lack of a substantial federal question.

Respectfully submitted,

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Appellants

v.

MARILYN C. HINDEN ET AL.

Appellees

On Appeal From The Superior Court, Appellate Division of the State of New Jersey

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellees' "Question Presented"

(1) Appellees' rewording of the first Question Presented in the Jurisdictional Statement is extremely clever, but we suggest it may be further improved by substituting "admissions to" for "the membership practices of", thus eliminating the last vestige of resemblance to the issue in this case. The statute itself does *not* prohibit discrimination in "membership practices," and we have raised no question as to the constitutionality of the statute as written, having had no occasion to do so. We assume it is constitutional. "Places" do not have members; organizations do. The determination below that Appel-

lants' organizations are "places" which may not "discriminate" in their membership policies is conclusive as a construction of the state statute–but it is that *application* of the statute to Appellants, not the statute itself, which raises the constitutional issue as set forth in the Jurisdictional Statement.

A "place" has no rights or freedoms of association; but voluntary, non-profit membership organizations do, and their rights are not constitutionally weakened by labelling them "places of public accommodation" within the meaning of a state enactment. Those rights cannot be eliminated on motion by so restating the question as to assume them gone.

(2) Appellees do not at this point notice at all the second and novel question, although it comes up in their Argument.

Appellees' "Counter Statement of the Case"

To the extent that the Counter Statement adds anything to our Statement of the Case, it consists largely of quotations out of context which are prejudicial and, whatever bearing they had on the Hearing Examiner's "findings", have no relevance to the constitutional questions presented here. There are several inaccuracies, and omissions which result in inaccuracies. It attempts, for instance, to make it appear that the former honorary "government members" had something to do with running the Squadrons, that "extensive advertising" related to other than the public charity, that Mrs. Hinden was not told she could attend the educational conference, that not all advanced courses

were available to women, etc. The attempt to prejudice the case by references to association with government officials and cooperation with government programs is completely irrelevant here, even if it would have any relevance in a state-action case. *All* citizens are invited by statute and proclamation to participate in Cooperative Charting and National Safe Boating Week; and such patriotic endeavors afford no excuse for attacking Palisades or the Squadrons.

As noted in the Jurisdictional Statement, we recognize that the "findings" of the Hearing Examiner, insofar as they pertain to facts, are conclusive; and also that the interpretation of the New Jersey statute by the New Jersey court is conclusive. There is no issue on that point. But what organizations are entitled to First Amendment protection is for the determination of this Court whose jurisdiction cannot be precluded by a Hearing Examiner's conclusion even if affirmed by a local court.

Appellees' "Argument"

Of the cases which Appellees cite for the proposition that *membership* may be dictated all, except *NOW v. Little League* 127 NJ Super 522, 318 A 2d 33, had to do with physical facilities, and the "memberships" in issue were rights to use those facilities. There is no such problem in this case. In *Little League* what was claimed for the girls was a right to participate in the public charity, not to run the outfit. The Squadrons have long welcomed women (including Mrs. Hinden) into their

public charity and thus have been in full compliance with *Little League.*

The contention that any organization which conducts a public charity necessarily exposes its membership to the public is absurd. If that were so, there could be no Moose, no Kappa Kappa Gamma, no Society of Jesus, etc. The repeated characterization of a "finding" of "a place of public accommodation" as "factual" is, of course, wrong. What is or is not "a place of public accommodation" is a pure question of law, not fact, and as to constitutional law a question for this Court.

At page 13 of their brief, Appellees finally take note of the second question: the right of an organization to become a private club (if it was not already) and thus escape the bureaucratic clutches. *Appellees concede that there is such a right:* "This is not to say . . . that . . . it could not thereby become a private organization." But that is not what the Director of the Division on Civil Rights said. When approached on that subject he arrogantly refused to listen and specifically decreed that Palisades could *not* change except to abandon all subjective considerations. (Item 7, p.23a, Jurisdictional Statement.)

Appellees statement at the top of p.13: "Finally, USPS's desire to change some of its rules regarding membership procedures so as to "become" a private club is simply a clear effort to evade the Law Against Discrimination through subterfuge." is patently untrue

and a gross insult, which impugns the good faith not of USPS or Palisades but of the Appellees. As Appellees well know, the effort was to eliminate all those things, even the clearly irrelevant ones, (such as the honorary memberships for selected government officials) which the Hearing Examiner said made membership in Palisades "a place of public accommodation" – a sincere attempt to *comply* with the law. It was hoped that the public charity could be continued, but because of the truculence of the Division on Civil Rights that has had to be suspended throughout New Jersey and will be permanently cancelled unless this Court grants relief. (Appellants cannot afford repeated litigation.) While this is injurious to Palisades and the other Squadrons in New Jersey, the heavy losers are the members of the public, including women, who are thereby deprived of desired free instruction.

The statement at the top of p.14 misrepresents the effect and purpose of the Division's order which undertakes to prohibit *any* selectivity as to either men or women, which is far from continuing what had been the practice as to men. It is as if a motorist apprehended for driving 60 mph were fined for that transgression, notwithstanding discovery that his speedometer was erratic and recorded only 55 mph, and then ordered to continue use of that speedometer. Appellees would say that if he sought permission to install a new and accurate speedometer to avoid future penalties that would be "simply a clear effort to evade the law through subterfuge".

The transparent purpose of that part of the Order is not, as asserted, to prevent evasion but to make sure that the Division can continue its surveillance–typical power grabbing. This, of course, should have been stopped by the New Jersey court. Since it was not, the word from this Court is needed, not only to give relief to these Appellants from the trampling on their constitutional rights, and to the other 400 Squadrons and their 80,000 members throughout the country from the precedential threat, but to establish on the highest authority that any private organization which has carelessly allowed itself to be characterized as "public" has a choice: *either* accept all the public *or* remove the "public" characteristics.

Appellees' "Conclusion"

We can agree with Appellees that in *NAACP v. Alabama* 357 US 488 and *Gibson v. Florida Legislative Investigating Committee* 372 US 539 what this Court did was to prohibit state action which *might* have "repressive effect" on NAACP. What we want the Court to do now is to prohibit state action which *does* have oppressive effect on Palisades and USPS and as precedent endangers other worthy organizations. That is a very substantial federal question, particularly in its novel aspect of the right of an erring private organization to correct its error and be private rather than going public.

* * * *

I have received no notice of appearance on behalf of Appellees with respect to the Petition for Certiorari, No. 75-1607, filed herein by William W. Farrar, Esq., on behalf of Lackawanna, Northern New Jersey and Watchung Power Squadrons. That Petition sets forth a claim of outrageous denial of due process in issueing an order purporting to bind them without their having been complained against, served or heard. That the damage to the Petitioneers is present and actual, and not merely future and speculative, is established by the fact that they have suspended, pending outcome of this litigation, their public charity, the Boating course, because they cannot afford the litigation costs of further harrassment. Such costs, to the Squadrons involved in litigation in New Jersey and New York, and to USPS, already exceed $200,000, a terrible burden for a private, non-profit membership organization supported entirely by the voluntary dues of its members.

Respectfully submitted,

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